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In The

Supreme Court of the United States

October Term, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

ANGELO J. SOLIMINO,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether preclusive effect should be given in an age discrimination case brought under the Age Discrimination in Employment Act ("ADEA") to the decision of the appropriate state administrative agency, as affirmed by the appropriate appeal board, where the parties were afforded a full and fair hearing before the state agency?

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INTEREST OF AMICUS[1]

Amicus Atlantic Legal Foundation is a non profit, public interest legal foundation, incorporated in Pennsylvania and headquartered in New York City. Its mandate is to present a balanced articulation of the public interest in litigations with broad impact and serious, often constitutional issues involved. The Foundation often is a spokesman for the interests of private enterprise. It has appeared as amicus curiae before this Court in a number of cases involving public interest issues, including *Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470 (1987); *Johnson v. Transportation Agency, Santa Clara County, Cal.,* 480 U.S. 616 (1987); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257 (1989); and *Pacific Mutual Life Insurance Company v. Haslip,* No. 89-1279 (Oct. Term, 1989).

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[1]. Pursuant to Rule 36 of the Rules of this Court, letters from counsel of record for the parties evidencing their consent to the filing of this brief have been filed with the clerk of this Court.

STATEMENT OF THE CASE

The facts underlying and the procedural history of this case are fully set forth in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, and in the brief for the United States and the Equal Employment Opportunity Commission ("EEOC") submitted at the request of this Court. We understand that Petitioner's brief on the merits will fully state these matters. We will not burden the Court with a repetition of the facts and procedural background, but will merely highlight the most relevant salient points.

Respondent Angelo J. Solimino ("Solimino") was employed by Petitioner Astoria Federal Savings and Loan Association ("Astoria") from October 4, 1945 through March 5, 1982, when, age 63, he was terminated as Vice-President of the Mortgage Origination Department of Astoria. A3[2].

On March 18, 1982, Solimino filed an age discrimination charge with the EEOC. *Ibid.* The EEOC, pursuant to a "worksharing" agreement, referred Solimino's complaint to the New York State Department of Human Rights ("DHR"). *Ibid.*

The DHR assigned the matter to a staff member for investigation. The DHR specialist investigated the charge, issued an Investigative Report on October 5, 1982 which summarized the

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[2]. References "A__" are to the Appendix to the Petition for Certiorari.

positions of the parties and the evidence submitted, and conducted a hearing on November 19, 1982. *Ibid.* The hearing was attended by both parties and their counsel, and, at the request of Solimino, witnesses gave sworn testimony and a stenographic transcript was made. *Ibid.*

On January 25, 1983 the DHR dismissed the complaint, finding no probable cause. Ibid. The New York State Human Rights Appeal Board, after submission by Solimino of a brief and oral argument, affirmed this determination on May 24, 1984. A3-4. Solimino did not seek judicial review of the DHR's finding and the Appeal Board's affirmance. A4.

Solimino commenced this action in the United States District Court for the Eastern District of New York on February 21, 1985. A4. The District Court dismissed the complaint on grounds of administrative estoppel. A19, 715 F.Supp. 42 (E.D.N.Y. 1989). The United States Court of Appeals for the Second Circuit reversed and remanded, A1-13, 901 F.2d 1148 (1990), finding that there was no Congressional intent in ADEA cases to accord preclusive effect in federal court to findings of no discrimination by state agencies which have not been judicially reviewed. A6.

SUMMARY OF ARGUMENT

This Court has, in two recent definitive decisions, reaffirmed the strong judicial policy in favor of according preclusive effect to decisions of state administrative agencies, whether or not these administrative determinations have been reviewed by state courts. These decisions are applicable in this case because neither the statutory language of ADEA, nor its legislative history, convincingly evidences a "clear and manifest" legislative intent to depart from the policy disfavoring *de novo* review.

The common law rule favoring preclusion and disfavoring *de novo* review is based on strong and principled policies of finality, consistency, judicial economy and fundamental fairness to all litigants.

If this Court affirms the decision of the Court of Appeals for the Second Circuit, it will sanction giving grievant a *post facto* choice of forum, based on the grievant's failure to persuade a state administrative agency with expertise of the viability or validity of grievant's charge. Such a decision will render virtually irrelevant the determination of the state administrative agency, that agency which has the expertise in the area of employment discrimination. This gives the claimant a second chance to try all the issues again. It subjects the employer and the dispute resolution process to duplicative costs and burdens.

Provided due process is accorded, preclusive effect should be given to the decision of an appropriate state administrative agency just as this Court held in *Kremer* that preclusive effect should be given to the decision of a state court. In many respects it should be given *a fortiori* because the state agency was established to deal with employment discrimination cases only whereas federal district courts hear many types of cases, only one of which concerns employment discrimination.

ARGUMENT

THE DETERMINATION OF A STATE AGENCY WITH EXPERTISE AND WITH JURISDICTION TO HEAR AND DECIDE SHOULD BE GIVEN PRECLUSIVE EFFECT EVEN IF NOT JUDICIALLY REVIEWED

Since 1790, all federal courts have been required to give such preclusive effect to state court judgments as they have under state law. That principle, essentially unchanged, is currently codified in 28 U.S.C. §1738. Federal courts have consistently applied res judicata and collateral estoppel to issues decided by state courts. These corollary principles of res judicata and collateral estoppel relieve parties of costly and vexatious multiple lawsuits, conserve judicial resources and prevent inconsistent decisions. *Allen v. McCurry*, 449 U.S. 90 (1980); *see Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 466 n6 (1982) ("*Kremer*").

Historically, federal courts have also given res judicata effect to state agency decisions that have been reviewed by state courts.

While *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) ("*Elliott*") held that 28 U.S.C. §1738 is not applicable to unreviewed state administrative factfinding, the Court recognized that federal courts frequently give preclusive effect to unreviewed state agency decisions provided that the agency proceedings satisfy due process requirements. *See also Kirkland v. City of Peekskill*, 828 F.2d 104 (2d Cir. 1987).

In *Elliott*, the Court pointedly noted that because 28 U.S.C. §1738 antedates the development of administrative agencies, "it does not represent a congressional determination that decisions of state administrative agencies should not be given preclusive effect." *Elliott* at 795. The *Elliott* Court went on to note that "...Congress, in enacting the Reconstruction civil rights statutes, did not intend to create an exception to the general rules of preclusion." (*Elliott* at 796-97; emphasis supplied).

The exception to the general rule that calls for applying the doctrine of preclusion occurs when Congress "'clearly manifests its intent" to depart from that doctrine. *Kremer* at 477. Indeed, in *Elliott* this Court has specifically recognized that "it is sound policy to apply principles of issue preclusion to the fact-finding of administrative bodies acting in a judicial capacity." *Elliott* at 797.

Moreover, as stated in the Restatement (Second) of Judgments §83, p. 269 (1982), cited with approval by this Court in *Elliott*, 798 n6:

> Where an administrative forum has the essential procedural characteristics of a court, ... its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.

The tortuous and tortured reasoning of the Second Circuit in this case itself amply demonstrates that there was no "clearly manifest" intent of Congress to depart from the general rule of preclusion when it enacted ADEA. The *Elliott* Court's exegesis of Title VII, relying heavily on the fact that it would be inconsistent to require the EEOC in such cases only to give "substantial weight" to state agency findings and orders, but to require federal courts to give state agency decisions preclusive effect in Title VII actions, *Elliott* at 795, is inapposite here because there is no comparable language in the ADEA. The principal basis for this Court's decision in *Elliott* denying unreviewed state agency decisions preclusive effect in Title VII claims does not apply to ADEA claims. There is no general policy favoring federal court participation in discrimination cases. *See Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988); *Yellow Freight Systems v. Donnelly*,

___ U.S. ___, 100 S.Ct. 1566, 1570 (1990).

Moreover, the *Elliott* court gave preclusive effect to a state agency determination of a section 1983 claim, reemphasizing that res judicata enforces repose, discourages repetitive litigation and forum shopping and promotes federalism and consistency in judicial decision-making. *Elliott* at 798-99. This further supports the position of *amicus* that the principle of preclusion should prevail except where Congress has manifested a clear intent to the contrary.

The teaching of *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) that giving preclusive effect to administrative fact-finding is consistent with the underlying principles of collateral estoppel and res judicata, *viz.* judicial "repose", was reaffirmed in *Kremer*, 456 U.S. at 484-485, n 26, and *Elliott*, 478 U.S. at 798, and is equally forceful whether the agency involved was a creature of federal or state law. As noted in *Elliott*, "Having federal courts give preclusive effect to factfinding of state administrative tribunals also serves the value of federalism." 478 U.S. at 798.

The judicial system's need to conserve its resources is even more apparent, as federal district court dockets grow apace.

Therefore, res judicata or preclusion should apply equally to judicial determinations and administrative agency determinations

and this Court has indicated its approval of this view. Title VII race discrimination claims seem to be the only exception to the preclusion rule. That makes sense, for res judicata or preclusion has been and continues to be a cornerstone of our jurisprudence.

A heavy burden of persuasion must be borne by the party who argues that res judicata or preclusion effect should not be given to a particular state agency determination. That approach is consistent with this Court's teaching in *Kremer* and *Elliott*. It is also consistent with the Eighth Circuit's approach in *Stillians*. There, the court based its analysis on a presumption in favor of common law principles of preclusion in deciding that a state agency determination did have preclusive effect in an ADEA case whereas the Seventh Circuit in *Duggan v. Board of Education of East Chicago Heights*, 818 F.2d 1291 (7th Cir. 1987) began with a presumption favoring repeal of res judicata in unreviewed administrative decisions in ADEA cases. The District Court in this case approached the issue in the same manner as the Eighth Circuit whereas the Second Circuit followed the Seventh Circuit. [3]

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[3]. *Also see, Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986) in which the Ninth Circuit applied the principle of preclusion to an ADEA claim and *Garner v. Unicare Health Facilities, Inc.*, 651 F.Supp. 422 (E.D.Wis. 1987) where the district court also gave preclusive effect to a state agency determination in an ADEA case.

The Second Circuit sought to equate Title VII with the ADEA and conclude there is no preclusive effect in ADEA cases because this Court said there is none in Title VII cases. But they missed the point, namely that there must be specific statutory language or legislative history ("clearly manifests") that requires a court to conclude no preclusive effect for an unreviewed state agency decision.[4]

As this Court stated in *United States v. Utah Construction & Mining Co.*:

> When a state agency acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts. 384 U.S. at 422.

Preclusive effect should be given here. There was no affirmative showing that Congress intended to vitiate the preclusive

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[4]. There is no specific statutory language or legislative history to overcome the general rule of preclusion. Indeed, as the Fourth Circuit stated in *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), cert. granted ___ U.S. ___:

> In fact, Congress' grant of concurrent jurisdiction over ADEA suits may evince an affirmative intent ... to permit waiver of the judicial forum. 895 F.2d at 200.

There, the employee's claims were disposed of by arbitration. The Fourth Circuit held this was proper so long as the employee received due process and his claims received a fair hearing. They did in *Gilmer* and they did in *Astoria*.

effect of state administrative agencies fact-finding in ADEA cases.

Moreover, respondent Angelo Solimino was given a fair hearing and due process before the New York State Department of Human Rights ("DHR").[5] The hearing was attended by both parties and their counsel. Witnesses were called by both parties. They were sworn and a transcript of their testimony was taken. Oral argument was heard. The DHR dismissed the complaint of Solimino, finding that no probable cause existed to believe that the alleged age discrimination had occurred.[6] The State Human Rights Appeal Board affirmed the decision of the DHR, after giving Solimino the opportunity to submit a brief and to present oral argument.

Solimino had the right and the opportunity to seek judicial review in state court of the state agency determination, but chose not to appeal the decision of the DHR, as affirmed by the State

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[5]. This agency is charged with the responsibility of investigating employee discrimination claims and deciding those claims after hearings. The expertise of the DHR is in the field of employee discrimination, including age discrimination. The DHR investigates and hears hundreds of cases each year just like or similar to Solimino's case. The courts of New York would give the DHR fact-finding determination preclusive effect. See *Astoria*, 715 F.Supp. 42 at 51 and cases cited thereat. A 28-29; *Kirkland, supra* at 107-109.

[6]. The standard of a fair hearing articulated by this Court in *Kremer* - "...a full investigation, wherein the complainant has full opportunity to present his evidence, under oath if he so requests" (at 485) - was clearly met here.

Human Rights Appeal Board, to the appropriate state court[7]. If he had appealed and the Appellate Division had affirmed, DHR's dismissal of Solimino's claim would have been res judicata and precluded under this Court's ruling in *Kremer*.

Solimino's claim would have also been precluded by the Second Circuit in accordance with that court's decision in *Kirkland v. City of Peekskill, supra*. There, plaintiff's Title VII race discrimination claims were dismissed by the federal district court on res judicata grounds because the New York State Division of Human Rights had dismissed Mr. Kirkland's complaint and that dismissal had been upheld by the New York courts. In affirming the Second Circuit cited *Kremer* and *Elliott*. However, in this case, the Second Circuit failed to uphold the principle of preclusion in a discrimination case where the plaintiff opted not to appeal the adverse state agency ruling to the state courts. The principle of preclusion should not turn on whether the complainant opted to exhaust his state remedies by appealing an adverse agency decision to the state courts. As this Court observed in *Elliott*, 798, n6, an agency determination "should be accorded the same finality that is accorded the judgment of a court." Solimino's failure to appeal to the New York State Supreme Court Appellate Division rendered

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[7]. Under the law in effect then, judicial review was available in the Appellate Division of the New York State Supreme Court.

the DHR determination final under state law. *See*, N.Y. Executive Law § 298 (McKinney 1982 & Supp. 1990); *Astoria* 715 F.Supp. 42, 51.

Should Solimino in effect be rewarded and allowed a second opportunity to litigate his claim because he elected not to appeal? Clearly, the answer to this question should be no. As the Eighth Circuit correctly pointed out in *Stillians*:

> "Were we to allow such a choice [appeal to state court or start a new suit in federal court] the state administrative proceeding would be reduced to nothing more than an opportunity for the petitioner to test his case and practice his presentation." 843 F.2d 276, 282.

If the Second Circuit decision stands, plaintiff and other employees will be in a no lose situation or, at the very least, the cards will be stacked heavily against the employer. If the employee wins before the state agency, that result will most likely end the matter, for the employer will be inclined to settle with the employee rather than incur further litigation costs where the agency's findings of fact will be upheld in the vast majority of cases. On the other hand, if the employee loses before the state agency, he can then file a claim in court and try his case all over again. He gets a second bite at the apple which tips the playing field in favor of the employee. Moreover, because of the costs and burden of litigation, the employer, faced with a second litigation,

may settle to avoid such costs even though he prevailed before the state agency.

Under federal common law principles, affirmed by this Court, the decision of the DHR should be given preclusive effect because: 1)there is no affirmative showing that Congress intended to vitiate the principle, 2) Mr. Solimino received a fair hearing and therefore had his day in court, and 3) an end should be put to costly and duplicative litigation.

CONCLUSION

The decision of the DHR that Solimino did not establish probable cause for his ADEA claim, as affirmed by the appeal board, should be given preclusive effect by this Court, for Solimino was accorded a full and fair hearing and he should not be given the opportunity to try his case again in another forum. The decision of the Court of Appeals should be reversed.

Dated: February 21, 1991

Respectfully submitted,

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